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EXAMINER

BLANKENSHIP, GREGORY A

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANTHONY SMITH

Appeal 2015-002270
Application 13/351,191
Technology Center 3600

Before MICHAEL L. HOELTER, ANNETTE R. REIMERS, and GORDON
D. KINDER, *Administrative Patent Judges*.

KINDER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Appellant¹ appeals under 35 U.S.C. § 134 from a rejection of claims
15–26 and 28–36. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ Appellant identifies the real party in interest as Lund Motion Products, Inc.

CLAIMED SUBJECT MATTER

The claims are directed to a vehicle cargo tailgate enclosure. Claims 15, 21, and 29 are independent. Claim 15 illustrates the claimed subject matter and is reproduced below:

15. A vehicle tailgate enclosure for use with a vehicle having an open storage bed having a rear end, a first upstanding side panel on one side of said bed, a second upstanding side panel on an opposite side of said bed, and a tailgate movable between an open position and a closed position, said tailgate enclosure mountable in a first position when said tailgate is in said open position in which said tailgate enclosure comprises:

a first side wall coupled to the first side panel;

a second side wall coupled to the second side panel; and

a connecting wall which connects said first side wall and said second side wall, a bottom portion of said connecting wall positioned above said tailgate and a top portion of said connecting wall positioned rearward of a rear end of said tailgate in said open position, said connecting wall above said tailgate extending from the bottom portion to the top portion at an angle of between about 10 and about 50 degrees from vertical;

wherein the first side wall, second side wall, and connecting wall define a plurality of passageways that allow air to pass through the walls.

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Bringman	US 5,154,470	Oct. 13, 1992
Leitner	US 6,402,215 B1	June 11, 2002

REJECTIONS

The Examiner rejected claims 15–26 and 28–36 over Leitner and Bringman.

OPINION

Claims 15–19, 23–26, 28–31, and 33–35.

Claims 15–19, 23–26, 28–31, and 33–35 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Leitner and Bringman. Appellant argues these claims as a group. *See* Appeal Br. 5, 8, and 9. We select claim 15 as representative, and claims 16–19, 23–26, 28–31, and 33–35 stand or fall with claim 15. 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that Leitner discloses all the features of claim 15 except that Leitner does not “disclose the connecting wall being angled upward and outward from the tailgate at an angle. Bringman . . . teaches forming the connecting wall 23 of a tailgate enclosure at an angle from vertical as shown in Figure 4.” Non-Final Act. 4. The Examiner then concludes

It would have been obvious to one of ordinary skill in the art at the time the invention was made to form the connecting wall of Leitner et al. at an angle such that it is upward and outward from the tailgate when in the first position as taught by Bringman, Jr. . . . to increase the enclosed volume of the open storage bed and resulting in the tubular members having different lengths at the first side wall where the first side wall is coupled of the first side panel to the rearmost section of the connecting wall.

Non-Final Act. 4. The Examiner’s Answer explains:

The angled connecting wall of Bringman, Jr. increases the cargo carrying capacity of the pickup truck when compared to a truck bed extension with a vertical connecting wall that does not extend beyond the extension panel. The rejection only uses the teaching of the angled connecting wall providing increased cargo capacity. The stated motivation for combining Leitner et al. and Bringman, Jr. is to increase the enclosed volume of the

open storage bed. The combination set forth in the rejection does not require an extension panel.

Ans. 2–3.

Appellant argues that one of skill in the art would not be motivated to combine Leitner and Bringman as the Examiner proposes because Bringman only teaches extending the length of a truck bed together with an angled rear wall. Appeal Br. 6. “Attaching an extension to the end of the tailgate is the only manner in which Bringman describes providing an extended cargo carrying capacity.” Appeal Br. 6. Moreover, according to Appellant, one of ordinary skill in the art would not take just the inclined rear wall of Bringman because that is only part of what Bringman discloses. Appeal Br. 7.

Discussing the question of obviousness of claimed subject matter involving a combination of known elements, *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, explains:

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, §103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. *Sakraida* [v. *AG Pro, Inc.*, 425 U.S. 273 (1976)] and *Anderson's-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57 (1969)] are illustrative—a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.

KSR, 550 U.S. at 417. We agree with the Examiner that a “connecting wall . . . extending at an angle of between about 10 and 50 degrees from vertical”

(Appeal Br. 15 Claims App.) is taught by Bringman. *See* Non-Final Act. 4 (“at an angle from vertical, as shown in Figure 4.”) Bringman also states that his bed extender is intended to “permit[] extended cargo carrying capacity.” Bringman, Col. 1, ll. 21–22, *see also* Ans. 2–3. The Examiner correctly found that modifying Leitner’s device to include an inclined rear wall would have been obvious at the time of the invention on appeal (Non-Final Act. 4). The result is an improvement that is no more than the predictable use of prior art elements according to their established functions.

Appellant also speculates that the rear wall of Bringman is inclined for aerodynamic purposes only. Not only is there no support whatsoever for this theory, as the Examiner found (Non-Final Act. 6), but such a motivation would not be relevant to the proposed combination. *In re Kahn*, 441 F.3d 977, 987–88 (Fed. Cir. 2006).

In view of the foregoing, we are not persuaded of error in the rejection of claim 15. Claims 16–19, 23–26, 28–31, and 33–35 fall with claim 15. *See* App Br. 8–9.

Claims 20 and 22.

Appellant argues claims 20 and 22 together. We select claim 20 as representative, and claim 22 stands or falls with claim 22. 37 C.F.R. § 41.37(c)(1)(iv). Claim 20 depends from claim 17, adding “wherein each of the plurality of tubular members has a different length from a first bend at the first side wall to a second bend at the rear most section of said connecting wall.” Appeal Br. 16 (Claims App.). The Examiner conceded that Leitner does not disclose this limitation but concludes,

It would have been obvious to one of ordinary skill in the art at the time the invention was made to form each tubular member of Leitner et al., as modified, with a different length between the rear most section of the connecting wall and the first side wall to provide a greater slope to the connecting wall to increase storage space when the tailgate is down and the tailgate enclosure is positioned substantially on the tailgate.

Non-Final Act. 4–5.

Appellant argues that Bringman does not teach the claimed way of making the rear wall inclined. Appeal Br. 9–10. We agree with the Examiner. “The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference. . . . Rather, the test is what the combined teachings of those references would have suggested to those of ordinary skill in the art.”

In re Keller, 642 F.2d 413, 425 (CCPA 1981). The Examiner finds that

[o]ne of ordinary skill in the art would recognize the additional length of the tube could be provided anywhere in front of the rear most portion of the connecting wall including between the rear most section of a connecting wall and a first side wall and between a first bend at a side wall to a second bend at the rear most section of a connecting wall.

Ans. 4. Appellant’s argument points out that there is at least one other way to achieve an inclined rear wall by the modification of Leitner, but the Examiner’s finding that other ways, including that claimed, would have been obvious stands unrebutted.

Accordingly, we find no error in the rejection of claims 20 and 22.

Claims 21 and 36.

Appellant argues independent claim 21 separately. Appeal Br. 11–12. Specifically, Appellant argues that the combination of Leitner as modified

by Bringman would not result in tubular members “having the same length at the first side wall.” Instead, Appellant proposes that combining Leitner with the angled rear wall of Bringman would be accomplished “by varying the length of the side wall at its top relative to its bottom,” (Appeal Br. 12) and this would not meet the quoted limitation.

The Examiner responds that “the additional length of the tube could be provided anywhere in front of the rear most portion of the connecting [i.e. rear] wall including between the rear most section of a connecting wall and a first side wall and between a first bend at a side wall and a second bend at the rearmost section of a connecting wall.” Ans. 4–5. Following the same reasoning as in connection with claim 20, we agree with the Examiner that lengthening the tube of Leitner could be done, e.g., in the middle of Leitner’s 90 degree bends, in a manner that would meet the limitations of claim 21, and that to do so would have been obvious to one of ordinary skill in the art at the time of the invention. Accordingly, we are not persuaded of error in the rejection of claim 21. Claim 36 falls with claim 21. Appeal Br. 13.

DECISION

For the above reasons, the Examiner’s rejection of claims 15–26 and 28–36 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED